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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1322

MAX LEVINSON, PETITIONER,

vs.

SPECTOR MOTOR SERVICE, A CORPORATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

PETITION FOR CERTIORARI FILED JUNE 19, 1945.

CERTIORARI GRANTED OCTOBER 8, 1945.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 139

MAX LEVINSON, PETITIONER,

vs.

SPECTOR MOTOR SERVICE, A CORPORATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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[fol. 1] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the 8th day of May in the year of our Lord, one thousand nine hundred and forty-four, within and for the State of Illinois.

Present: Clyde E. Stone, Chief Justice, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice William J. Fulton, Justice Walter T. Gunn, Justice June C. Smith, Justice Charles H. Thompson; George F. Barrett, Attorney General; Warren C. Murray, Marshal.

Attest: Edward F. Cullinane, Clerk pro tempore.

Be it remembered, that, to-wit, on the 2nd day of September, 1944, the same being in vacation after the term of Court aforesaid there was filed herein the Record of the Municipal Court of Chicago in a certain cause entitled:

No. 28309

MAX LEVINSON, Employee, Appellant,

vs.

SPECTOR MOTOR SERVICE, a Corporation, Appellee

4161115 42651

Appeal from Appellate Court, First District

[fol. 2] And Afterwards, on the same date, to-wit, September 2, 1944, there was filed by Appellant herein, an Abstract of Record, which is in the words and figures following, to-wit:

[fols. 3-7] In the Supreme Court of Illinois, September Term, A. D. 1944

Max Levinson, Employee, Plaintiff-Appellant,

vs.

Spector Motor Service, a Corporation, Defendant-Appellee

Appeal from the Appellate Court of Illinois, First District, on Certificate of Importance

There Heard on Appeal from Municipal Court of Chicago

Honorable Wendell E. Green, Judge Presiding

Abstract of Record—Filed September 2, 1944

Placita.

Plaintiff's Statement of Claim

Praecipe and Statement of Claim, amount claimed, $500.00, filed April 16, 1942, as follows:

"Plaintiff brings this action to recover from defendant unpaid overtime compensation in the amount of $487.44, and an additional equal amount of liquidated damages, pursuant to Section 16(b) of the Fair Labor Standards Act of 1938 (Pub. No. 718, 75th Cong.; 52 Stat. 1060), hereinafter referred to as the Act, and particularly Section 7 of said Act, which reads in part as follows:

'Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is [fol. 8] engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than

one and one-half times the regular rate at which he is employed.'

Jurisdiction is conferred on the court by Section 16(b) of the Act.

The aforesaid Act became effective October 24, 1938. Defendant employed plaintiff from October 1, 1939 to September 30, 1940 as a laborer on the basis of clock time, for which period no claim is made.

Defendants employed plaintiff from October 1, 1940 and continuously thereafter up to and including October 6, 1941 (except one week vacation during July, 1941), for which claim is made; that his work consisted of moving freight to trucks where it was to be loaded and unloaded; he received freight which was to be unloaded from private customers' trucks, placing same on two-wheel trucks; he stamped bill of lading from various states named thereon and turned same over to the office; he received incoming freight from various states and cities which was shipped to said terminal; he checked shipment bills from various states named thereon against shipment freight loads to see that they corresponded and tallied correctly; he checked payrolls of dock hands, all of which constituted the performance of duties in interstate commerce within the meaning of the aforesaid Act.

During the aforesaid period of October 1, 1940 to October 6, 1941, defendant employed plaintiff in the performance of duties in interstate commerce as aforesaid for workweeks longer than the applicable maximum number of [fol. 9] hours under Section 7 of the aforesaid Act and failed and refused to compensate him for such employment in excess of such applicable maximum in such workweeks at the rates of not less than one and one-half times the regular rates at which he was employed.

During the aforesaid period from October 1, 1940 to October 24, 1940, inclusive, defendant employed plaintiff in its said terminal as aforesaid for 87 hours during each week and paid wages to plaintiff at the rate of $150.00 per month, or 40¢ per hour. Under the provisions of Section 7 of said Act, plaintiff should have received 40¢ per hour for the first 42 hours in each such workweek and under the provisions of Section 7 of said Act, overtime compensation at a rate of not less than 20¢ per hour for each hour in excess of 42 in such workweek. Plaintiff was accordingly

underpaid the sum of $9.00 during each such workweek, or $30.87 for the said period.

That from October 25, 1940 up to and including said date of October 6, 1941 (excepting said one week vacation duly July, 1941) defendant employed plaintiff in its said terminal as aforesaid for 87 hours during each week and paid wages to plaintiff at the rate of $150.00 per month, or 40¢ per hour. Under the provisions of Section 7 of said Act, plaintiff should have received 40¢ per hour for the first 40 hours in each such workweek and under the provisions of Section 7 of the Act, overtime compensation at a rate of not less than 20¢ per hour for each hour in excess of 40 in such workweek. Plaintiff was accordingly underpaid the sum of $9.40 during each workweek, or $456.57 for the said period.

Plaintiff prays judgment for $487.44 and for an additional equal amount as liquidated damages, together with costs and a reasonable attorney's fee."

Summons issued April 16, 1942.

Appearance of defendant, Spector Motor Service, Inc., filed April 18, 1942.

Original affidavit of merits, filed July 21, 1942.

[fol. 10] Order entered December 15, 1942, granting leave to defendant to file amended affidavit of defense instanter.

Amended Affidavit of Defense

Defendant's amended affidavit of defense, filed December 15, 1942, as follows:

"Plaintiff has no right to bring any action under the Fair Labor Standards Act because of nature of the plaintiff's employment and he is specifically exempted from the aforesaid Act.

That this defendant is engaged in the business of an interstate freight by motor vehicle; that the activities of this defendant, and its employees are under the specific jurisdiction of the Interstate Commerce Commission by virtue of the U. S. Motor Carrier Act of 1935; that plaintiff performed, pursuant to his said employment, the duties of and actually worked as a Dockman, Loader and Dock Foreman, and during all of said time he performed no duties other than those inherent to, directly connected with and incidental to the duties of a Dockman, Loader and Dock Foreman, and as such was directly connected with and his

work was responsible for and incidental to the safety of the vehicles and the cargo carried thereby, and the persons connected therewith or who may come in contact with said cargo, vehicles or either or both of them, and does not come under the provisions of the said Labor Act in that employees of said category are specifically exempted thereby.

That defendant denies that it employed the plaintiff for the number of hours set forth by him.

DEFENDANT'S MOTIONS FOR JUDGMENT

Defendant's written Motion at close of all the evidence, to enter judgment for the defendant and against the plaintiff.

Order overruling defendant's Motion at close of plaintiff's case, for a finding against the plaintiff.

Order overruling defendant's Motion at the close of all the evidence, for a finding in favor of the defendant.

[fol. 11] Defendant's written motion at the close of plaintiff's evidence, for judgment in favor of the defendant and against the plaintiff.

Draft order entered by court December 28, 1942, as follows:

FINDINGS AND JUDGMENT

"This action is predicated on the Fair Labor Standards Act of 1938.

It is alleged by plaintiff that defendant is engaged in interstate commerce; that plaintiff was employed by defendant from October 1, 1939 to September 30, 1940 as a laborer on the basis of clock time, for which no claim is made; that from October 1, 1940 up to and including October 6, 1941, plaintiff was employed by defendant as a terminal foreman and on a different basis than theretofore, at the rate of $150.00 per month payable bi-monthly; that he then acted as terminal foreman and performed incidental duties, none of which were connected with safety of operation and involved wide fluctuations in the time required to complete his duties;

That under Section 7 (a) (2), which was operative from October 25, 1939 to October 24, 1940, the work week was forty-two (42) hours, whereas plaintiff worked eighty-seven (87) hours; that under Section 7 (a) (3), which became operative October 25, 1940 up to the present, provided for a work wek not longer than forty (40) hours, whereas plaintiff

worked eighty-seven (87) hours per week; for all of which he is entitled to time and one-half, together with a sum equal for liquidated damages and attorney's fees.

To this claim defendant filed an affidavit of merits generally denying there is due plaintiff any moneys or that plaintiff worked the alleged number of hours and asserted that plaintiff is exempt from Fair Labor Standards Act of 1938 but comes within Section 13 (b) (1) of the same Act. Specifically, this defendant admits all the duties alleged [fol. 12] to have been performed by the plaintiff except that of checking payrolls and that plaintiff was employed as a dock hand and did the usual work of a dock hand.

Defendant subsequently filed an amended affidavit of merits with the same general allegations but in the main alleging that plaintiff worked as a dockman, loader and dock foreman and performed no other duties than those inherent to, directly connected with and incidental to the duties of a dockman, loader and dock foreman.

During the trial of this cause plaintiff testified in support of his allegations as to his duties performed from October 1, 1940 to October 6, 1941, some of which were connected at most with the stacking of outbound freight in a proper and safe manner. However, the duties which he performed other than that were numerous and involved wide fluctuations and the time that consumed was by far greater than his supervisory acts with reference to stacking outbound freight. He also testified in support of his allegations as to the number of hours worked.

Defendant introduced testimony to support its contention.

The Court FINDS as a matter of fact that the testimony in this case supported plaintiff's claim that he worked eighty-seven (87) hours per week from October 1, 1940 to October 6, 1941.

The Court FINDS as a matter of law that plaintiff received One Hundred Fifty Dollars ($150.00) per month, and was not paid for the overtime which he worked in violation of Section 7 (a) (2 and 3).

The Court further FINDS that plaintiff's work to be performed, or the major portion thereof, for the period herein sued did not affect the safety of defendant's operations within the meaning of Section 16 (b) of the Fair Labor Standards Act and is not exempt under and by virtue of the provisions of said Section 16 (b) of the Fair Labor Standards Act of 1938.

That in accordance with the findings herein above enumerated, the Court further FINDS that plaintiff worked [fol. 13] eighty-seven (87) hours per week from October 1 to October 24, 1940, which is 3-3/7 weeks, which under Section 7 (a) (2) was limited to forty-two hours per week.

The Court FINDS that plaintiff worked eighty-seven (87) hours per week from October 25, 1940 to October 6, 1941, which is 48-4/7 weeks, which under Section 7 (a) (3) was limited to forty hours per week; that the salary of One Hundred Fifty Dollars ($150.00) per month divided by the number of hours worked and time and one-half for overtime in violation of the provisions of this Act amounts to Four Hundred Eighty-seven and 44/100 Dollars ($487.44).

The Court further FINDS that under the provisions of this Act plaintiff is entitled to a like sum of $487.44 as liquidated damages and under further provisions of this Act is entitled to Attorneys' fees in the sum of $175.00.

WHEREFORE, the Court finds the issues in favor of plaintiff, Max Levinson, and against the defendant, Spector Motor Service, a corporation, and assesses said plaintiff's damages in the sum of $1,149.88 and costs sustained.

Accordingly, therefore judgment is now entered in the sum of $1,149.88 against the defendant Spector Motor Service, a corporation, in favor of the plaintiff, Max Levinson, together with the plaintiff's costs."

Defendant's Appeal Bond set as $1,500.00.

Defendant's written motion for new trial, filed January 7, 1943.

Defendant's motion in arrest of judgment, filed January 7, 1943.

ORDER OVERRULING MOTION FOR NEW TRIAL

Order entered January 7, 1943, denying defendant's motion for new trial.

ORDER OVERRULING MOTION IN ARREST OF JUDGMENT

Order entered January 7, 1943, denying defendant's motion in arrest of judgment.

NOTICE OF APPEAL

Defendant's Notice of Appeal, filed January 13, 1943.

[fol. 14] Proof of service of notice, on January 13, 1943.

Praecipe for complete authenticated transcript of record, filed January 22, 1943.

Notice of defendant's motion, filed January 22, 1943, to approve Appeal Bond.

Order entered January 22, 1943, approving defendant's Appeal Bond, ordering that Report of Proceedings be approved and ordered filed.

Appeal Bond approved and filed January 22, 1943.

Stenographic report of proceedings, filed January 22, 1943.

Leave granted plaintiff to amend Statement of Claim.

REPORT OF PROCEEDINGS

MAX LEVINSON, plaintiff, called as a witness on his own behalf, testified as follows:

Direct examination.

By Mr. Yale:

I was first employed by Spector Motor Service in October, 1939. I checked, unloaded and received freight. I worked there until October 6, 1941. There are three phases to this Motor Service business—inbound freight, outbound freight and a city local. Inbound freight are trucks loaded with freight coming on from the East, that is, Spector Motor trucks coming in from the East. They operate from certain states, New York, Connecticut and so forth. The Spector Motor Company has a terminal located at 600 West 25th Street for receiving inbound freight. The inbound place is about a half block long connected with the office, and the trucks coming in back up against the terminal.

We usually work in gangs of three or four men together. One is a checker, one is an unloader and one is a wheeler. [fol. 15] The checker goes into the office, asks for bills to correspond with the load. He gets the bills from the terminal manager, gets his gang together, and they start unloading the freight on the terminal. The checker checks the freight, the sorter sorts it, and the wheeler puts the freight in separate sections in the terminal and is told by the checker where to put it. That is the inbound. Outbound freight was operated in the same manner, but mostly evenings after five o'clock, up to the early hours in the morning. With reference to outbound freight, there is during the day a collection of freight going to all points

east which they operate. It is received and put in the separate sections. At night, after four o'clock, the loading into trucks for outbound freight starts, which is done in the same manner by checkers, callers, sorters and packers. That is, operated mostly in a foreman's gang. The caller calls for so many pieces for so and so, the checker checks his bills, the sorter wheels it in, and the stacker stacks it according to the amount of space in the trailer. The checker determines the weight with respect to the amount of outbound freight. Outbound freight is loaded into Spector Motor trucks. With reference to local freight, a local carrier will come in with a load of freight going to the East, either with his own truck or a company truck. He pulls up to the terminal with the load of freight and hands the checker his bills. The checker calls his gang and unloads it. The wheeler takes it in. The checker is supposed to tell him where to put it. When everything is checked and found correct, it is up to the checker to mark it received and take it to the office to the rate clerk. The driver follows the checker into the office, and the rate clerk—who most of the time is the cashier—pays him for bringing in that [fol. 16] amount of freight. That is the method where the man that works for himself is hauling and gets so much a hundred for bringing in freight. That is the system with reference to local delivery. Local freight is accumulated on the terminal all during the day, and after four o'clock, we start loading it into the trucks for outbound to the eastern states.

I worked a year under the time clock system until October 1, 1940. During that year I was paid by drafts. No claim is being made for that period. On October 1, 1940, I went to Mr. Spector's private office where I found Mr. Spector, Mr. Arnold and myself. Mr. Spector said, "I am going to appoint you foreman. Things are not running so good. Of course, you know what the duties of a foreman are." I said, "What are they supposed to be in your estimation?" And he said, "Well, keep the payroll down, trying to get as much work as possible out of the men, and, of course, take care of the terminal, and above all, Jack Levinson is your superior." I said, "O. K." We were going to work on a three eight hour shift, and didn't want any more extra men if we could help it, like working on days and having to pay them at night. I went back upstairs again the same afternoon, showed Mr. Spector a

little illustration and what I had made out, and he said for me to go ahead. I called up the union and we started to put this three eight hour operations into effect. My job was to supervise. I was a checker, and I used to check the freight coming in, receiving, and I had a wheeler to wheel it and put it into the sections where I used to tell him, like Jersey, New York, and so on. I marked these bills received. I then took them into the office and gave them to the gate clerk, who in turn gave them to the biller, [fol. 17] and they were billed. Then I went outside and the same thing happened to other loads of freight that would come in. Hundreds of thousands of pounds of freight would come in during the day. The amount of time of my day's work on local freight would be like spurts. A little in the morning, a little in the afternoon, and it would amount to quite a few hours. With reference to incoming freight, we used to work in gangs. When it came in, I used to check the loads and then, in the morning, they were loaded out on the city trucks to be delivered in the city. That consumed quite a few hours of the day's work—about half a day I would say. The outbound freight was done mostly at night, beginning on an average about four or five o'clock at night. I was still there when the night foreman came in. He used to come between seven and eight o'clock. I did the same operation with reference to the outbound freight that we did with the other. I checked the freight while they were stacking it, and calling it and wheeling it. I had nothing to do with reference to carrying packages into the trucks on outbound freight. I used to hire the men, and it was my business to see that a man got an application, a time card, social security card, see that he punched his card on time when he started and got through at noontime and so forth. When a man wanted to quit, it was up to me to O.K. his time card and see that he got his pay. I gave the time cards to the young lady who figured out the time. After she figured the time she used to have me O.K. it and then there was a draft made out for this individual. I had to watch in case a man was off, to see that his time card was marked off. The regular men had a forty-eight hour guarantee.

We used to have a regular staff meeting every Wednesday night, which I attended, which would last two or three [fol. 18] hours up in the conference room, and we discussed the matters of the week. I used to have to confer with

Mr. Arnold a couple of times a week on account of the payroll, because he was the auditor. I had to watch that bills were made out right, sometimes there were mistakes in the weight, sometimes in the piece of freight. If anything of that kind happened, I had to go to the proper party to have it corrected in the office. I had something to do with reference to the lease operators. The terminal manager used to hire them and determine the price he would pay to take the loads out. Mostly these lease operators went to the East or to St. Louis. Then he would turn them over to me. I would see that they made out the lease, the application before we started to load them, and then turn them in to Jack Levinson for his approval. Then the men would start to load them. From October 1, 1940, I started to work on Sunday, and worked Sunday evening and Monday morning. I worked from Monday, 7:00 until about 7:00 o'clock at night. Sunday I worked about three or four hours. Tuesday, Wednesday, Thursday and Friday, I worked from 7:00 to 7:00. Saturday, I worked from 7:00 until about 3:00 or 4:00 o'clock Sunday morning. Saturday, I began work at 7:00 A. M., and worked until about 3:00 or 4:00 Sunday morning. I spoke with the terminal manager about the hours I was working beginning October 1, 1940, after a few months had passed. We had quite a few discussions about long hours. I told him that it was quite a lot of work and the hours were very long, and that my health was getting kind of impaired. He said he would send a recommendation upstairs. There wasn't anything done about it. Finally, close to the end of the year, I was put on nights, but I did not go to work nights. [fol. 19] October 1, 1941, we had a discussion again and he fired me. When I came to work after October 1st, and up to the time I was fired, the other foreman, Leo Gatz was there. There were no more than two foremen. He started between 7:00 and 8:00 o'clock. I left after he got there, because he had to relieve me. I had to tell him certain instructions, whatever went on during the day. I stated that outbound freight work started about 4:00 or 5:00 o'clock in the evening.

Cross-examination.

By Mr. Golden:

I was the day foreman. There are two types of inbound freight—one type is collected throughout the city of Chi-

cago, the other comes in from connecting carriers, either from the South, West or other parts of the country. Not only freight from the city, but freight from out of town comes in. It is inbound freight. Freight comes in from the East and from the West practically all day long. I work in both the outbound and the inbound division. Quite a few men worked on the dock who were directly responsible to me. I have charge of, say three or four gangs. Each gang consisted of three or sometimes four men. They all loaded and unloaded freight in the entire operation. There is a lot of checking, a lot of inspecting to be done to see that the packages are intact and have not been pilfered with. That is all part of the loading and unloading. If there is any discrepancy, there is an OSD made out, which means over, short and damaged. As these packages are taken off the trucks they are sorted in accordance with their destination, and it becomes necessary that these packages be put in piles, depending upon how many there are. I supervised how these packages were to be distributed, [fol. 20] into what sections and how they were piled. I watched everything that went on the dock. If I saw a man coming in who was drunk, it was part of my duty not to let him work that day. If I saw a man was improperly stacking packages so that they might fall down in the terminal and hurt somebody or break the packages, it was my duty to a certain extent, to correct him. While I was there, trucks, either Spector trucks, lease operators or interline carriers were loaded to go over the road. I wouldn't say these trucks were being loaded all day long. It just depends upon how much freight accumulated on the dock. If it becomes accumulated, then they start to load. On certain days they loaded it during the day while I was there. It isn't a very common thing to constantly load outgoing freight all day long, but at certain times it was being done. Some freight comes in from the East during the night, mostly it comes in during the day. I testified that about half my days was taken up in checking inbound freight. The other half was spent in checking, and supervising and so forth. To a certain extent a checker watches the loading of the truck and the distribution of the weight in the truck. While I was doing this work as a checker, it came to my knowledge on occasions that I had extremely heavy packages or pieces of machinery, or steel, or such heavy weights that had to be put in the truck. As a checker,

it was my duty to call them to the man who picks out the stuff for bottom freight or balloon freight. Bottom freight is heavy freight, and balloon freight is top freight that fills in the top. Balloon freight is put on the top because you couldn't put the heavy weight on top of the balloon freight, that is in order that the top freight shouldn't crush the bottom freight. There are many loads sent out with [fol. 21] an average weight of fifteen thousand pounds. At certain times they wanted to move faster so they filled it at an extra weight. To fill it out they put some light freight in. It may be small boxes where there is plenty of room in the trailer, and to fill it out to make it twenty thousand pounds. In other words, when they had a fifteen thousand pound shipment they put in balloon freight that weighed five thousand pounds more to fill out the twenty thousand pounds. As a checker, I didn't exactly know the weight capacities of the various vehicles. We had no scales at the time to weigh them. It is the duty of the checker to check the weight of the freight that goes into each trailer if it is possible. If a checker wouldn't check these weights I would know he isn't doing his duty, and I would reprimand him. The stacker is supposed to know the various weights of the various articles. I did not have charge of very much loading. The night man had charge of the loading. I had charge mostly of the city loading. Jack Levinson was my superior. He was not in the office all the time. I was in charge of all the men on the dock except my superior Jack Levinson during the day. These men that I was in charge of did nothing else but handle, load, unload, check and stack freight. I saw that things should go right. If any man did something wrong I tried my best to correct him and show him the proper and easier way to do it. There isn't very much stacking during the day. These men also loaded the city delivery trucks. They started in the morning and continued all day while I was there. City delivery means taking the freight out to any city. I was not exactly in charge of the gangs that loaded the city delivery trucks. Most of the city trucks were loaded before I got down so I [fol. 22] wasn't in charge of them in full. Some of the city delivery trucks were loaded in the morning while I was there, but there was not very much loading of any outbound freight while I was there. It took up quite a few hours. About thirty percent of my time was taken in supervising

loading. The other seventy per cent was spent in supervising the men, checking and so forth. I helped quite a bit there too. Working on a terminal you are a working foreman. He does everything. Jack had four or five of his own picked men out of the sixteen that I testified to. I was in charge of the balance of the men.

The night foreman had gone home about three or four in the morning before I came. He came on between 7:00 and 8:00. It isn't a fact that he usually came on between 5:00 and 6:00—very seldom. Some mornings I did and some mornings I didn't start at the same time as Jack Levinson. Sometimes I started before. Maybe about half the time I started at the same time as Jack Levinson did. Mostly I quit maybe fifteen minutes or a half hour before he did. To a certain extent Jack and I worked about the same number of hours. Sometimes he worked Sundays. I had off from Sunday morning until Sunday evening, unless we had a meeting. I worked from about 9:00 to 12:00 on Sundays. I worked Saturdays from 7:00 in the morning until 3:00 or 4:00 Sunday morning. I was a union man and paid my dues during all of that time. We had quite a few meetings on Wednesday nights. I attended most of them. I don't remember how many. I didn't count the number of meetings that I attended during the winter months. I don't remember missing any of them. It is not a fact that I attended only four of those meetings. I at-
[fol. 23] tended at least eight or ten or twelve. I did not negotiate or solicit any lease operators or try to get them. That was Jack Levinson's job. I saw that their leases were made out and their applications were made out. It isn't a fact that that was Jack Levinson's job. When he hired or contracted for the price of one, he used to turn them over to me, and I saw that they made out the application. We couldn't load until his application was made out, and O.K.'d by Jack. I did not have to O.K. the application. That was Jack's job. I can't remember how long it took to give him the application and take it back approved. It depended upon how long it would take the man to fill it out. I didn't fill it out for him. I did something else while he was filling it out. It isn't a fact that I used to wait around for him to drive me home. I did in my first year when I was working on the clock. In the second year one of the boys used to take me home most of the time.

Redirect examination.

By Mr. Yale:

These meetings used to take on an average about two or two and a half hours. I used to have dealings with the time cards of the employees mostly every day. I spent quite a few hours I would say every day, also at the end of the week.

Recross-examination.

By Mr. Golden:

I mean the time cards which the various men on the dock punched. I did not figure their wages. That was done by one of the girls in the office. I don't know the maximum number of cards. I took out the cards of the night crew at the end of the week. I used to go through them to see just about how many hours they put in. That was my [fol. 24] job. The day and night crew, and sometimes ten extra, amounted to forty cards. What I actually did was just glance through to see that they weren't over-estimating their limit. I then took the cards to the girl who figured out the time. It took me several hours a day to glance through those thirty or forty cards.

Redirect examination.

By Mr. Yale.

During the period from October 1, to October, 1941, I usually took a half hour for lunch.

Whereupon, the plaintiff rested his case.

Jack Levinson, called as a witness on behalf of the defendant, testified as follows:

I am transportation manager for Spector Motor Service, have been so employed for the last seven or eight months, and was terminal manager for a period of about three years prior to that.

As transportation manager, my duties are to see that the freight is properly received and loaded. I don't do any of the labor. I supervise the men under me, various fore-

men and checkers. From October 1, 1940 to October 6, 1941, my duties as terminal manager consisted of general management of the terminal, in charge of all of the employees in the terminal, but not the employees in the office. I hired plaintiff as an ordinary dock man at first, where he was paid on the regular basis as an extra man. Then he was put on the regular basis where he would check freight, receive freight, load freight, and so forth. On October 1, 1940, he was given a permanent job as dock foreman. I was his superior and gave him orders and naturally was to look out for things that he wouldn't expect—[fol. 25] stealing in the terminal or thefts. He had something to do with the loading or unloading of vehicles. As a man in charge of a gang, he would have authority to direct the men as to how they were to put certain freight in a certain piece of equipment or vehicle. That came to an end and he was put in charge of a gang of men with the duties of loading and unloading and O. S. D. reports, and so forth, the same as any other man in that position would have. This position is called a checker. During that short period of four or five weeks, Levinson had authority to hire and fire. He had nothing whatsoever to do with the payroll. He did not check any payroll cards, that was done by a clerk in the office. He had nothing to do with the leased operators during that five week period, except to have conversation with them. It might have consisted of saying "hello" or "goodbye." He did not check their applications. During the period that he had authority to hire and fire, he checked applications for the dock men. The period that he had that authority did not extend over ten weeks. The only occasion Mr. Levinson had of making out lease operators' leases was when the night man would be off, and he would be asked to fill in. That might have happened two or three times, and I doubt whether it happened that often. It would take about five or ten minutes to fill out that application. During that four to eight weeks, his supervision consisted of hiring and firing men; he had authority to tell me whom he wanted in the terminal which was the same as hiring and firing. He would walk through the terminal, point out to the men that they were not working fast enough, or should load it this way or another way. He would tell them how to stack the freight in the terminal, where to put it, the way to lay it [fol. 26] in a room, and so forth. He wouldn't show them

what freight to put in, the bills were already routed by a man ahead of him in the office. Most of the work was always on the day shift. He did work nights for a short time, but that was towards the end. I used to drive him to work between 7:00 and 8:00 o'clock. His hours were through at 4:00 or 5:00 o'clock, depending on what time he got to the terminal, but he would wait for me to drive him sometimes to 8:00, 9:00, and sometimes 10:00 o'clock. The night foreman came on between 5:00 and 6:00 in the evenings. During the times Max Levinson was on duty, the work on the dock consisted of unloading trucks which had arrived from the East or St. Louis or the West. There was occasionally loading to be done of city equipment, and there was also loading of outbound equipment. During that eight week period he was in charge of all the crews. After that eight week period the work of firing was taken away, and he was put into work with a gang. During that eight week period, Max Levinson called the union with reference to workmen. After the eight week period he had no more to do with it. With respect to loading, his duties were to see that certain freight was put on top, certain freight on the bottom, certain positions in the truck for certain pieces of freight. The checker has the bills on which appear the name of the shipper, consignee, number of pieces, weight, commodity, and so forth. The weight and commodity absolutely have to do with reference to the position in which it should be placed in a truck.

Max Levinson attended about four of these Wednesday night meetings that were testified to here. Our meetings took from about 7:00 o'clock to 9:00 or 10:00 o'clock in the evening. He did not attend any of these meetings after that eight week period when he acted as a foreman.

[fol. 27] Cross-examination.

By Mr. Yale:

The secretary, Oliver J. Arnold kept a record of the attendance at those meetings. Those who attended were listed as being present. I am not an executive of the Spector Motor Service. I was present at all of the meetings held by the company. He did not handle the time cards. That was done by a clerk in the office. Her name was Delores Evans. There was no one there that figured time

cards besides myself or some assistant? Max Levinson did not handle time cards even after he was made foreman. I was always directly responsible for the loading or unloading of merchandise for shipping or stacking in a terminal, but I had no active physical duties with regard to it. I instruct the gangs that work on the loading or unloading, as to how to do it, and when to do it, I would issue instructions on how to stack. The process of checking consists of weighing one piece or ten pieces, putting on notations to that effect, noting shipper's name, consignee's name, commodity, if possible, and approximate weight. If you are loading, where to put it in the truck, how to put it in the truck. The checker usually stands at a checking table. He may help his men, if they need assistance. A gang consists of four men. The loader will load L T L shipments. That means less truck load shipments. He sets the freight into the truck. If there is anything wrong with the weight, it is up to the checker of the gang to instruct him how to do it. The stacker and loader are the same. The caller calls the freight from the floor or from the truck, whatever it might be and sets it up for a wheeler or trucker to take into the truck. Max Levinson did not have anything to do with lease operators after he became foreman. Lev- [fol. 28] inson knew that he was deposed as foreman when he was put on a gang and was given three men to work with. I did not testify that Mr. Levinson gave instructions to inbound drivers as to what speed to use while driving in the city. I would say that practically all day long you have as much inbound freight as you have outbound. Our inbound freight is usually handled during the night, from midnight to morning, and outbound is concentrated more or less between 8:00 A. M. and 12:00 midnight. I drove Mr. Levinson to work practically every morning between 7:00 o'clock and 7:30. I drove him home any time between 7:00 and 9:00 o'clock at night. He was waiting for me at night to take him home. He would wait 2, 3, 4 hours. He would not be working up until two hours before 7:00 to 8:00. He worked until 5:00 o'clock. There may have been times he waited for four hours. I couldn't recall. He waited almost his entire stay at the Spector Motor Service. His hours were through at 5:00 o'clock. He had the liberty of leaving then. He did not work and he did not leave. At that time, he had an hour for lunch.

I came down here because I happened to be Max Levinson's superior at the time he was employed. I have never quarreled with him regarding this claim. He did call on me on one occasion. I never talked to him about filing this claim. I called you (Mr. Yale) and told you I was going to stop him from getting a job anywhere because of making this claim.

Redirect examination.

By Mr. Golden:

Max Levinson's home was between my home and the Spector Motor Service. There were a number of times when a man had been placed in one gang was shifted to another, from time to time.

[fol. 29] Ted Jarvis, a witness called on behalf of the defendant, testified as follows:

Direct examination:

By Mr. Golden:

Mr. Jack Levinson has been my superior throughout the time I have been employed by Spector Motor Service as a checker, loader, in fact, everything pertaining to handling freight. During all the time between October 1, 1940, and until Max Levinson left, I had an opportunity to observe what he did. He was known as a checker of the gang. He had charge of four men in his crew. There was a period of a month or a month and a half when he was known as the dock foreman. That is what he told us and he was just bossing the other gangs to the effect of what to do. He came out with a bunch of way bills and would tell a certain gang to load this truck either for city delivery or trailer, or he would come out with way bills that he got with a load from the East, and give it to the gang and tell them to unload it in the house, and after it is in the house they routed the bills according to different parts of the city, and he would tell them to load the freight for that certain section. A checker's table is an ordinary table that we move all around the dock wherever the work has to be done. During the period he acted as foreman, he would

give the gang the bills, tell them to load certain trailers or trucks, whichever the bills were marked for after the city dispatcher had them routed in the different sections in the city. He also told them with reference to loading of city and out of town trucks. He supervised the loading and the unloading, seeing to it that the load was properly stacked. He was there a little longer, I imagine, than [fol. 30] I, because he would hang around after he was through. After he was no longer a foreman he did the same job as the other checkers in the terminal, checking freight, loading freight. You have to load just so much into the trailer, and the load has to be properly distributed. The stacker or stower, stows it in there, puts whatever the checker wants to go in there because, as I say, we just put so much weight into the trailer and not any more, but it is to be certain freight. If it is not suitable for one trailer it may be put into another. The stacker may call for some balloon—by balloon I mean light freight—then we have bottom freight—heavy freight. We put the bottom freight in first, then we put in some balloon—that is the lighter parcels.

Cross-examination.

By Mr. Yale:

The day before yesterday was the first time that I ever heard about this case, when Mr. Golden said we have to come to court next day. I never made a claim against Spector Motor Company for overtime. I was never paid for overtime. Jack brings the bills out to us from a dispatcher in the office. The truck driver brings them in because he has to be checked in. Then it used to be the city dispatcher that used to give them out. Then we take that bunch of bills and start giving orders for loading or unloading, whatever it may be. I would say that there was half loading and half unloading in the city house. That is with reference to outbound and inbound freight. Mr. Levinson had a little of hiring and firing to do for the period he was there. I have nothing to do with lease operators. I load their trailers if that is what you are referring to. I have nothing to do with leases. I don't [fol. 31] have anything to do with the rate clerk. I have nothing to do with time cards other than my own. As a checker I never had occasion to attend meetings of the com-

pany's personnel. As a checker I do not have any dealings with Mr. Arnold. It is not my duty in any way to O. K. time cards or distribute drafts to the employees and I would not know if he did it. I think Mr. Levinson called the union for help a couple of times. I wouldn't know whether he had any dealings with Mr. Arnold, or any dealings with reference to leases and lease operators. I would not know whether he had anything to do with Miss Butz with reference to figuring up time of each dockman.

Redirect examination.

By Mr. Golden:

I never saw Max Levinson figure any time cards while I was there. I never saw him make any leases with lease operators while I was there. He was out on the dock, except when he sat in the office.

SAM FISHMAN, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Golden:

I remember the period he worked there before October, 1940. His position was changed, he got to be a boss. He was directing the work on the dock for a couple of months. He wanted us to load the trailers his way and break them down his way. By breaking down I mean putting weight on a certain spot in the trailer so that it wouldn't overweigh the trailer. Breaking down means taking the weight off the trailer and putting it in sections of the house. He told us where and how to put it in the different sections. [fol. 32] Before he became a boss Mr. Levinson worked on the dock doing everything. He also did loading. In October, 1940, he became a boss or supervisor or foreman—it was just a couple of months. During the time before he got fired, and between the time he was a foreman, he was a checker. We started working together about six months before he was fired and I worked with him in a gang up to the day he was fired. When Mr. Levinson was working with me in the gang, the cashier figured the payroll. I

have not seen Mr. Levinson ever figure payroll, nor figure time cards. I never noticed anything about his hiring or firing help. During the six months that I worked with him I never saw him make out leases with lease operators. During the six months I was with Max Levinson when he first started we used to have a night shift, then we started at 8:00 o'clock in the morning. We used to work from 8:00 to 4:30. Sometimes we worked overtime a little until 6:00 or 7:00 o'clock. Max Levinson and I started together and quit together during those hours. We used to have a half hour for lunch. In the beginning we had Sunday off, then started on Wednesday off. They changed it. During all of the time that I worked with Max Levinson we worked six days a week. In the beginning Max Levinson was on the night shift with me. That was after he was a boss. He worked a couple of months on nights. I was with him on the night shift and during all of the period until he got fired.

Cross-examination.

By Mr. Yale:

I worked a couple of months at night with Max. I couldn't tell you exactly when they began and when they ended. I know that he was checking on my gang. That [fol. 33] is the only thing I know. I don't know anything else. I think we used to start work at 7:00 in the morning till 4:30. They changed it. That was about six months before he was fired, and then we worked days, and after that they changed us on nights again. I don't remember exactly whether on October 1, 1940, we started at 7:00 or 8:00. Levinson wasn't working with me October 1, 1940. Until six months before he was fired he did not work with me. Up to that time I don't know what he did or didn't do. I used to get to work with Levinson. He used to be there when I arrived. Then we left about 3:00 or 4:00 in the afternoon—me and him and the whole gang, four men in the crew. All four of us used to start together and leave together. He used to come ahead of me. He used to come with Jack Levinson all the time, drive down. I don't know whether he was working on the time cards. I don't know anything about whether he was working on the leases for lease operators, nor whether he was working on checking bills. If he called up the union for help before

I got there I wouldn't know about that. I don't know of anybody he hired. He told me where to put the freight in the house, in the sections. The loading and unloading during any day was about fifty-fifty.

WILLIAM A. PROKOP, called as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Golden:

I got on Max Levinson's gang. I remained on his gang until he quit. I can't tell offhand when that was. He was working directly with me and was the boss. He was practically the boss of the whole dock at that time, dock foreman until he quit. He also worked on the gang and directed my gang and other gangs. He started working with me in the morning at 6:00 o'clock and sometimes at 7:00 o'clock, and worked until 3:30 or 4:00 in the afternoon, sometimes 5:00. We worked nine hours, sometimes ten hours a day. I never worked on the night shift during Max's time. I worked on the day shift the whole time. A checker's duty is to see that the loads are properly loaded and checked out and the goods taken in or given out according to the bill of lading, and the loads properly loaded and unloaded.

[fol. 34]

Cross-examination.

By Mr. Yale:

As a checker you have to see that the freight is checked according to the sections in the terminal and according to the places it has in the truck. You also check with reference to the correctness of the amount of freight as against the amount of charges. To determine whether the amount of weight is correct as given, I look at it, check it up, and if the weight is approximately right, you check it off, but if you have any added weight, the weight isn't right, you go and weigh it over and change the weights. We have no authority to change the rates or anything. We just see that the weights are right. Naturally when we have checked the weights it has something to do with the rates or prices.

It is very seldom that the weights are not right on the bills. The main thing of checking is the shortage of pieces, not the weights so much. To make out the O. S. D., that takes time. O. S. D. means over, short or damaged. We make out a form, whatever it is, short or damaged or over, and leave it go through the regular routine. Of the nine hours a day it sometimes takes five minutes, sometimes an hour to go [fol. 35] through these processes as a checker, if we get a lot of shortages, it takes a lot of time, but, as a rule, we don't have much of it nowadays. We do that on inbound as well as on outbound freight. I have a stacker in my gang whose business it is to stack freight so that everything is O.K. I suggest to him the different points and then we restack it. The time consumed in loading for outbound and for loading inbound, stacking up in the terminal, equals about fifty-fifty. When I first started at Spector Motor Company I got to work at the same time Mr. Levinson did. He was always there when I got there. I left ahead of him after my day's work. I wouldn't know whether Mr. Levinson made a call to the union. If he would be doing anything with reference to a lease I wouldn't know about that, nor whether he was handling time cards of employees. Practically all the workers, the whole organization, are now invited to what they call public meetings. They used to be called once a month regular.

Max Levinson, the plaintiff, being recalled as a witness on his own behalf, testified as follows:

Direct examination.

By Mr. Yale:

I heard the testimony of Jack Levinson. He did not say to me, about a month or two months after October, 1940, that I was fired as a foreman. He did not say anything about my being fired as a foreman until October 6, 1941. I did not, after a month or two of being foreman, start working with any particular gang as a checker. I worked all the time as a checker. I used to help them out. I used to pitch in with any of the gangs. A foreman on a terminal is a working foreman. I did not stop working on the time cards at any [fol. 36] time during October 1, 1940, and October 6, 1941. During that period I did not stop hiring and firing. I did

not on any day during October 1, 1940, to October 6, 1941, wait two or four hours to have Jack Levinson take me home. During that period I lived about five miles from the terminal. It takes thirty to forty minutes to get home with the street car. He did not take me to work every morning. Private Sorenson took to work lots of times.

Cross-examination.

By Mr. Golden:

I said that during the period from October 1, 1940, to October 6, 1941, until I was no longer in the Spector employ, I was a working foreman. I worked from 7:00 in the morning to 7:00 in the night; sometimes later than that, it all depended on just what the work was. I worked seven days a week. I had Sunday mornings off unless there was a meeting. I worked those twelve hours a full day except a half hour for lunch. I was a working foreman, pitched in and did everything that was necessary on the dock. I hired and fired men. I did not hire or fire any office help, had nothing to do with the office.

The men I hired did loading, checking, wheeling and stacking. I would reprimand a employee for anything wrong but didn't fire. This was up to Jack Levinson. I used to walk around and watch the terminal.

I did not think it was necessary to go around and look at the loads on the city trucks. There were no other working foremen on duty at the time I was on duty. I did mostly checking. I said that I checked the time cards sometimes Friday, sometimes every other day. Sometimes I had occasion to call the union for help twice during the day. That conversation would take fifteen minutes, a half hour, it just [fol. 37] depends. I would deal with two, three or four lease operators going to St. Louis, mostly. It would take an hour or two to get them all in shape. I was not with the operator an hour or two, and it would not take an hour or two to fill it out. I would have to see that it was O.K. It took me about a half hour for each man.

Redirect examination.

By Mr. Yale:

I said I worked twelve hours every day except Saturday. Saturday I worked from 9:00 in the morning until the early hours Sunday morning. Nineteen or twenty hours on

Saturday, something like that. On Sundays I worked from 9:00 to 12:00 in the evening, three hours. All the other days, twelve hours.

Whereupon, both sides rested their case.

Which was all the evidence offered or received on the trial of the above cause.

Certificate of trial judge, dated January 22, 1943.

Certificate of the Clerk of the Municipal Court of Chicago.

Respectfully submitted, Yale & Yale, Attorneys for Appellant.

[fol. 38] **Abstract of Appellate Court Record**

Certificate of Appellate Court that the attached transcript of record marked 42651 is the original record filed in said Court on March 3, 1943.

Placitas.

Order of Court entered March 18, 1943, assigning this cause to the Third Division of the Appellate Court.

Order entered April 14, 1943, granting Appellee 30 day extension of time from April 16, 1943 to file briefs.

Order entered May 5, 1943, taking this cause under advisement.

ORDER OF REVERSAL

Order entered June 30, 1943, that the Court being of the opinion that there is manifest error in the record and proceedings of the Municipal Court in the rendition of the Judgment, said Judgment is reversed and annulled and that this cause is remanded to said Municipal Court with directions to enter Judgment for costs for defendant and to be taxed against plaintiff and that defendant have execution therefore.

ORDER DENYING PETITION FOR REHEARING

Order entered July 24, 1944, that the petition of appellee praying for a rehearing be denied.

ORDER GRANTING LEAVE TO APPEAL

Order entered July 24, 1944, reciting that the court during the June term having considered appellee's petition for leave to appeal to the Supreme Court of Illinois and having considered the counter suggestions of appellant, it is the

opinion of the court that this cause involves questions of law of such importance on account of principles and collateral interests that it should be passed on by the Supreme Court and that, therefore, leave to appeal be allowed to said Supreme Court of Illinois.

[fol. 39] Certificate of Appellate Court Clerk certifying that the foregoing is a true copy of the final order, Judgment and all proceedings in this cause.

Respectfully submitted, Yale & Yale, Attorneys for Plaintiff-Appellant.

Harry L. Yale, Of Counsel.

[fol. 40] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eleventh day of September in the year of our Lord, one thousand nine hundred and forty-four, within and for the State of Illinois.

Present: William J. Fulton, Chief Justice; Justice Clyde E. Stone, Justice Walter T. Gunn, Justice June C. Smith, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice Charles H. Thompson; George F. Barrett, Attorney General; Warren C. Murray, Marshal.

Attest: Edward F. Cullinane, Clerk pro tempore.

And Afterwards, to-wit, on the 30th day of September, 1944, the same being in vacation after the term of Court aforesaid, there was filed by Appellee herein an Additional Abstract of Record, which is in the words and figures following, to-wit:

[fol. 43] IN THE SUPREME COURT OF ILLINOIS, SEPTEMBER TERM, A. D. 1944

MAX LEVINSON, Employee, Plaintiff-Appellant,

vs.

SPECTOR MOTOR SERVICE, a Corporation, Defendant-Appellee

Appeal from the Appellate Court of Illinois, First District, on Certificate of Importance

There Heard on Appeal from Municipal Court of Chicago Honorable Wendell E. Green, Judge Presiding

Additional Abstract of Record—Filed September 30, 1944

OMITTED PORTIONS OF PLAINTIFF'S STATEMENT OF CLAIM

Defendant is a corporation organized and existing under and by virtue of the laws of the State of Missouri and licensed to business in Illinois, and at all times hereinafter mentioned was and is engaged in the business of motor transportation of freight for interstate commerce in and through all the eastern states of America.

* * * * * * *

That beginning with the aforesaid date of October 1, 1940, plaintiff was paid on a different basis than that for which he was paid previously, namely, $150.00 per month.

[fol. 44] OMITTED PORTIONS OF DEFENDANT'S AMENDED DEFENCE

* * * * * * *

This defendant further denies that the plaintiff is entitled to recover the sum of Four Hundred Eighty-Seven Dollars and Forty-Four Cents ($487.44) or any other sum whatsoever.

* * * * * * *

Admits that it is engaged in the business of an Interstate Common Carrier of freight by motor vehicle, and as such is in Interstate Commerce.

* * * * * * *

That the defendant denies that it employed the plaintiff for the number of hours set forth by him in his Statement of Claim, and states the fact to be that it paid to the plaintiff all salaries or wages due to the plaintiff for any and all services or work performed by the plaintiff for and on behalf of the defendant.

* * * * * * *

MOTION FOR NEW TRIAL

Defendant's written motion for new trial, filed January 7, 1943, as follows:

"Now comes the defendant, Spector Motor Service, Inc., by Golden & Golden, its attorneys, and moves the court to grant said defendant a new trial, and for grounds of said Motion, shows to the court the following:

1. The finding and the judgment of the court are, and each of them is contrary to the evidence.

2. The finding and the judgment of the court are, and each of them is contrary to the law.

3. The finding and the judgment of the court are, and each of them is contrary to the law and the evidence.

4. The finding and the judgment of the court are, and each of them is contrary to the preponderance of the testimony.

[fol. 45] 5. There is no evidence in the record to sustain the finding or the judgment of the court.

6. The testimony shows that the plaintiff is not included within the class of employees provided for by Section 7, or any other Section of said Fair Labor Standards Act of 1938.

7. The testimony shows that the plaintiff is included within the class of employees who are specifically exempted from the operation of said Fair Labor Standards Act of 1938, by Section 13 of said Act, particularly sub sections (a) (1) and (b) (1) and (2).

8. The court is without jurisdiction to enter the judgment herein for $1,149.88 on the pleadings, because the ad damnum limits the amount of possible recovery to $500.00.

9. There is no evidence in the record to sustain the finding or the judgment of the court.

10. The court erred in denying defendant's Motion at the close of the plaintiff's evidence, to find the issues against the plaintiff and in favor of the defendant.

11. The court erred in denying defendant's Motion at the close of all the evidence, to find the issues against the plaintiff and in favor of the defendant."

* * * * * * *

MOTION IN ARREST OF JUDGMENT

Defendant's motion in arrest of judgment, filed January 7, 1943, as follows:

"Now comes the defendant, Spector Motor Service, Inc., by Golden & Golden, its attorneys, and moves the court in arrest of judgment, and for grounds of said Motion, shows to the court the following:

1. The finding and the judgment of the court are, and each of them is contrary to the law.

2. The court is without jurisdiction to enter the judgment herein for $1,149.88 on the pleadings, because the ad damnum limits the amount of possible recovery to $500.00.

[fol. 46] 3. The court erred in denying defendant's motion at the close of the plaintiff's evidence, to find the issues against the plaintiff and in favor of the defendant.

4. The court erred in denying defendant's Motion at the close of all the evidence, to find the issues against the plaintiff and in favor of the defendant."

* * * * * * *

REPORT OF PROCEEDINGS

MAX LEVINSON, plaintiff, called as a witness on his own behalf, testified as follows:

Direct examination.

By Mr. Yale:

I started working for Spector Motor Service October 1, 1939, and was paid by cash. I punched a time clock to show the number of hours I worked. I was paid with a draft.

I worked a year under the time clock system until October 1, 1940. During that year I was paid by drafts. No claim is being made for that period. On October 1, 1940, Jack Levinson, the dock terminal manager, called me into the office and said that Mr. Spector would like to see me.

. . . . . .

I said, "O.K."

. . . . . .

"Mr. Arnold asked what I would suggest to keep the payroll down," and I said, "Let's put in three eight hour shifts." Mr. Spector told me to go on downstairs into the office and figure things out. He said we were going to work on a three eight hour shift, and didn't want any more extra men if we could help it, like working on days and having to pay them at night, and so forth and so on. I went downstairs and started to figure the thing out, and went back upstairs again and told Mr. Spector that I had it all [fol. 47] arranged, and so forth and so on. Mr. Spector called me about noon time. The conference lasted a couple of hours.

. . . . . .

I had a conference with Jack Levinson, and we figured this thing out and he seemed to approve of it. The next day I got a card from Jack Levinson which he requested me to fill out. I asked him what it was for, and he said that from now on I was an executive and was put on the personnel payroll, and would be paid semi-monthly. With reference to my salary, Jack came down from upstairs and told me that I would now receive One Hundred Fifty Dollars a month, and would be paid twice a month. I continued on with my duties as a foreman. My job was to supervise.

. . . . . .

I did nothing else with reference to the bills.

. . . . . .

The regular men had a forty-eight hour guarantee. They were allowed forty-eight hours according to union rules, so I had to watch all that.

. . . . . .

I omitted one thing in stating what I did while working as a foreman. When this personnel card was offered to me and I filled it out, Jack Levinson, the general manager, told me that I would not have to punch any card any more. From October 1, 1940, to October 6, 1941, I did not punch a card. After October 1, I did not get paid with drafts, but was paid by check from the office upstairs. The executives get paid by checks from Spector Motors.

. . . . . .

Finally, close to the end of the year I was put on nights. I worked nights for a few weeks. No, he put me on nights but I did not go to work nights.

. . . . . .

[fol. 48] I don't remember whether I had any vacation during the time I was working for Spector Motor Company from October 1, 1940 to 1941.

. . . . . .

Cross-examination.

By Mr. Golden:

We are primarily concerned with that period commencing October, 1940.

As a foreman, I said my duty was to supervise the men. Spector Motor Service had two foremen. One day foreman and one night foreman.

. . . . . .

I was the head man on the dock.

. . . . . .

The checker is at the head of a gang loading a truck.

. . . . . .

I supervised these checkers and also acted as checker.

. . . . . .

I hired all the help and never took on any green help. The place where the freight is received, sorted and sent out is a terminal. I had charge of that entire space.

. . . . . .

During the day I was in charge of every man on the dock except the men who were superior to me. The only man superior to me on the dock was Jack Levinson.

. . . . . .

About thirty or forty per cent of my time was taken in loading. The other sixty per cent was spent in supervising the men, checking and so forth.

. . . . . .

I was in direct charge of all the men who loaded and unloaded vehicles during the hours which I spent at the terminal or dock.

. . . . . .

I said that a working foreman on the dock does practically everything. He helps out in case a man is short, in case [fol. 49] you can't get a man, and so forth. He mostly takes the responsible job, just checking. If a checker is a competent man, he is the man in charge of the crew that either loads or unloads. He kind of directs operations.

. . . . . .

The night foreman came on between 7 and 8, I guess.

. . . . . .

During the time I worked as a foreman, I worked pursuant to the union contract.

Redirect examination.

By Mr. Yale:

. . . . . .

I don't recall anything with reference to a vacation.

. . . . . .

(Defendant's written motion, at close of plaintiff's evidence, for judgment in favor of defendant, and order overruling same, *cf.* rec. pp. 36 and 38.)

. . . . . .

JACK LEVINSON, called as a witness on behalf of the defendant, testified as follows:

* * * * * * *

Prior to that, I was employed in the transportation business by Gregg Carloading and Distributing Company. In all, I have been in the transportation business about eleven years. I have been a loader, unloader, checker, caller, and so forth.

* * * * * * *

On October 1, 1940, he was given a permanent job as dock foreman. There was a raise of salary in connection with that.

* * * * * * *

He would instruct the men the proper procedure for loading, where to put it in the truck which would result in the equipment moving safely over the road, if it were over the road equipment, or of the speed at which a local delivery [fol. 50] driver might effect his actual deliveries in the city. He would show them how to load up the city delivery trucks.

* * * * * * *

He usually came down with me. I used to drive him to work between 7:00 and 8:00 o'clock. We had no specified time. His hours were through at 4:00 or 5:00 o'clock, depending on what time he got to the terminal.

* * * * * * *

There was loading of both inbound and outbound equipment during the day. Max Levinson was in charge of his own crew that had that loading.

* * * * * * *

After the eight week period, his position was that of dock checker or freight checker, whose duties are to supervise the men working under him, the proper way to unload the truck, where to put the freight, how to load the freight, and how to stack it in the truck. With respect to loading, his duties were to see that certain freight was put on top, certain freight on the bottom, certain positions in the truck

for certain pieces of freight. He had charge of that. It's up to the checker to use his discretion. Too many cooks will spoil a pie. It's up to the checker to do that, not the other three men.

Cross-examination.

By Mr. Yale:

. . . . . .

The fourth man is the checker, in charge of the gang.

. . . . . .

I would say that practically all day long you have as much inbound freight as you have outbound. That applies during the day as well as during the night, there is as much inbound and outbound freight moving both day and night.

. . . . . .

[fol. 51] Ted Jarvis, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Golden:

. . . . . .

I was employed by Spector Motor Service in January of 1940, and have been continuously employed by them since as a checker, loader, in fact, everything pertaining to handling freight. Loading and unloading freight, all phases connected with it, and have been on both the day shift and night shift while Max Levinson worked there. He worked nights when I worked nights, and I worked days when he worked days also.

. . . . . .

I worked there an average of ten hours a day, and he was there when I was there. I never saw him do any office work—sitting at a desk.

. . . . . .

He supervised the loading and the unloading, seeing to it that the load was properly stacked and packed so that it

would ride safely. The checker's main job is to see that the load is properly stacked.

. . . . . .

The checker is the head of these gangs. He is responsible for everything, the weight, seeing that the load is properly stacked so that it rides safely on the highway. If it is not properly stacked it is a safety hazard, because it sways. As the load rides a certain number of miles, it will shift in there.

. . . . . .

I would say that was half loading and half unloading in the city house, that is with reference to outbound and inbound freight. It is about fifty-fifty.

[fol. 52] Sam Fishman, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Golden:

. . . . . .

A checker has charge of each gang. He carries the bills, he stands by the table. He tells the others what to do. He wants it his way. He knows the weights. I don't remember exactly how long before he was fired Max Levinson acted as a checker, but he was a checker right up to the time he was fired. He wasn't foreman up until the time he was fired. I worked all shifts, nights and days, alternately from one to another.

. . . . . .

I was with him all during this time, and had a chance to see what Mr. Levinson was doing.

. . . . . .

William A. Prokop called as a witness on behalf of the defendant, being duly sworn, testified as follows:

. . . . . .

Cross-examination.

By Mr. Yale:

. . . . . .

As a checker I see that the load is loaded right, even if the stacker is there. I suggest to him the different points and then we restack it.

. . . . . .

We both started at 7:00 o'clock or 6:00 o'clock, whatever time he told us to start. We worked there until Max Levinson told us to quit. He was the boss there. He was the one that told us when to start and when to quit. He told our gang as well as the other gangs.

. . . . . .

[fol. 53] Max Levinson, the plaintiff, being recalled as a witness on his own behalf, having been previously sworn, testified as follows:

. . . . . .

Cross-examination.

By Mr. Golden:

. . . . . .

Q. Did you fire any men?
A. I did, some.

. . . . . .

Order re Original Report of Proceedings

Order entered January 22, 1943, granting motion of defendant that the original report of proceedings at the trial may be incorporated in the transcript of the record on appeal.

Respectfully submitted, Golden & Golden, Attorneys for Defendant-Appellee.

Joseph L. Golden, Maurice P. Golden, David Axelrod, Harry J. Lurie, Of Counsel.

[fol. 54] And Afterwards, to-wit, on the 28th day of October, 1944, there was filed by L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, a Motion for Leave to File Brief as Amicus Curiae, and Suggestions in Support of said Motion, which are in the words and figures following, to-wit:

[fol. 55] In the Supreme Court of Illinois, September Term, A. D. 1944

No. 28309

Max Levinson, Employee, Plaintiff-Appellant,

vs.

Spector Motor Service, a Corporation, Defendant-Appellee

Appeal from the Appellate Court of Illinois, First District, on Certificate of Importance

There Heard on Appeal from Municipal Court of Chicago
Honorable Wendell E. Green, Judge Presiding

Motion for Leave to File Brief as Amicus Curiae

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, moves for leave to file a brief as amicus curiae in the above entitled cause. The granting of the Administrator's motion will not unduly delay the adjudication of the rights of the parties. Suggestions in Support of this motion are filed herewith pursuant to Rule 49 of the Rules of the Supreme Court of Illinois.

Douglas B. Maggs, Solicitor; Bessie Margolin, Assistant Solicitor; Kenneth P. Montgomery, Regional Attorney; Sidney A. Jones, Jr., Attorney, Attorneys for L. Metcalfe Walling, Administrator, Wage and Hour Division, United States Department of Labor.

[fol. 56] IN THE SUPREME COURT OF ILLINOIS, SEPTEMBER TERM, A. D. 1944

No. 28309

MAX LEVINSON, Employee, Plaintiff-Appellant,

vs.

SPECTOR MOTOR SERVICE, a Corporation, Defendant-Appellee

Appeal from the Appellate Court of Illinois, First District, on Certificate of Importance

There Heard on Appeal from Municipal Court of Chicago Honorable Wendell E. Green, Judge Presiding

SUGGESTIONS IN SUPPORT OF MOTION OF L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The suggestions made herein are set forth in support of the motion of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, to file a brief as amicus curiae herein.

1. This case comes before this court on a Certificate of Importance from the Appellate Court of Illinois, First District. The Appellate Court reversed the judgment of the Municipal Court of Chicago entered in favor of the plaintiff-appellant in an action brought under Section 16(b) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. sec. 201, hereinafter referred to as "the Act".

2. The Administrator is charged with the duty and responsibility of enforcing the Act. His interest is the public interest expressed in a remedial statute of great importance, designed to correct and eliminate substandard labor [fol. 57] conditions in industry engaged in interstate commerce or in the production of goods for interstate commerce. In his capacity as Administrator, he has been and is advising employers and employees of the applicability of the Act and the interpretations placed upon the various provisions of the Act and from time to time has announced and is announcing his enforcement policy with reference to

general or particular situations. Since he is charged with the duty and responsibility of administering and enforcing the Act, he has a real and substantial concern in the interpretations and rulings that may be made in employee suits and the effect they may have on the administration of the Act. It is the Administrator's responsibility under Section 11(a) to commence actions under Section 17 to restrain violations of the Act. He must determine under what circumstances he will commence such an action.

3. The suit in the Municipal Court involved questions concerning the proper interpretation and application of the Act which are of public interest and importance. This appeal, likewise, presents questions concerning the proper interpretation and application of the Act which are of public interest and importance. The applicability of the Act to the plaintiff in this case and to employees similarly circumstanced throughout the United States is of importance in the administration of the Act.

4. This case involves the interpretation of Sections 204(a)(1) and (2) of the Motor Carrier Act and of Section 13(b)(1) of the Fair Labor Standards Act. A determination of the questions involved in this cause will of necessity affect the administration of the Fair Labor Standards Act and the enforcement policy pursued by the Administrator. The decision in this case will affect thousands of employees of motor carriers throughout the State of Illinois and will indirectly affect hundreds of thousands of employees throughout the country.

[fol. 58] 5. The brief which the Administrator desires to present to the court deals with the following issue: Is a motor carrier employee, who performs *any* duties with respect to the safety of operation of motor vehicles, exempt from the overtime provisions of Section 7(a) of the Fair Labor Standards Act of 1938, by virtue of Section 13(b)(1) of said Act in conjunction with Section 204(a)(1) and (2) of the Motor Carrier Act of 1935?

6. The point involved is one of first impression. The point decided by the Appellate Court in this case had not previously been decided by any Appellate Court in the State of Illinois and has never been decided or presented to this court. Likewise, the point has not been decided by the Su-

preme Court of the United States or by any United States Circuit Court of Appeals:

It is therefore respectfully submitted that the motion to file a brief as amicus curiae should be allowed.

Douglas B. Maggs, Solicitor; Bessie Margolin, Assistant Solicitor; Kenneth P. Montgomery, Regional Attorney; Sidney A. Jones, Jr., Attorney, Attorneys for L. Metcalfe Walling, Administrator, Wage and Hour Division, United States Department of Labor.

[fol. 59] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the thirteenth day of November in the year of our Lord, one thousand nine hundred and forty-four, within and for the State of Illinois.

Present: William J. Fulton, Chief Justice; Justice Clyde E. Stone, Justice Walter T. Gunn, Justice June C. Smith, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice Charles H. Thompson; George F. Barrett, Attorney General; Harry G. Newman, Marshal.

Attest:

Earle Benjamin Searcy, Clerk.

And afterwards, to-wit, on the 14th day of November, 1944, being one of the days of the term of court aforesaid, the Court having considered the Motion by L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, for Leave to File Brief as Amicus Curiae and the Suggestions in Support of said Motion, Doth Deny said Motion.

[fol. 60] And Afterwards, to-wit, on the 27th day of November, 1944, an Order of Submission was entered by this Court herein, which is in the words and figures following, to-wit:

[fol. 61] No. 28309

LEVINSON, Employee, Appellant,

vs.

SPECTOR MOTOR SERVICE, a Corp., Appellee

Appeal from Appellate Court, First District

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that appellant hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause

is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

[fol. 62] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the 8th day of January in the year of our Lord, one thousand nine hundred and forty-five, within and for the State of Illinois.

Present: William J. Fulton, Chief Justice; Justice Clyde E. Stone, Justice Walter T. Gunn, Justice June C. Smith, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice Charles H. Thompson; George F. Barrett, Attorney General; Harry G. Newman, Marshal.

Attest:

Earle Benjamin Searcy, Clerk.

And afterwards, to-wit, on the 17th day of January, 1945, the same being one of the days of the term of Court aforesaid, an Opinion was filed by this Court herein and entered of record, which is in the words and figures following, to-wit:

[fol. 63] Docket No. 28309—Agenda 51—November, 1944

MAX LEVINSON, Appellant,

v.

SPECTOR MOTOR SERVICE, Appellee

Mr. JUSTICE THOMPSON delivered the opinion of the court:

This is an appeal on a certificate of importance from a judgment of the Appellate Court for the First District. Appellant, Max Levinson, brought an action in the municipal court of Chicago, against appellee, Spector Motor Service, a corporation, to recover overtime compensation and an additional equal amount of damages, pursuant to sections 7 and 16(b), of the Fair Labor Standards Act of 1938. (52 U. S. Stat. 1060; Title 29 U. S. C. A. sections 201-219.) We shall hereinafter refer to the appellant as plaintiff and to the appellee as defendant.

From October 1, 1939, to October 6, 1941, plaintiff was employed by defendant, a Missouri corporation, licensed in Illinois and engaged in interstate commerce as a motor carrier of freight. Section 7 of said act, which it is contended was violated, provides as follows: "(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—(1) for a workweek longer than forty-four hours during the first year from the effective date of this section, (2) for a workweek longer than forty-two hours during the second year from such date, or (3) for a workweek longer than forty hours after the expiration of the second year from such date,—unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

The aforesaid provisions of the act became effective October 24, 1938, and plaintiff claims that he worked 87

hours per week for the period from October 1, 1940, to October 6, 1941, during which time defendant violated section 7 of the act by refusing to pay him time and a half for all hours in excess of 42 hours per week during the period from October 1 to October 24, 1940, and for all hours in excess of 40 hours per week from October 25, 1940, to October 6, 1941, less one week's vacation.

Plaintiff was employed by the Spector Motor Service at its terminal located at 600 West Twenty-fifth street, in the city of Chicago, and checked, unloaded and received [fol. 64] inbound freight. The inbound receiving platform is about a half-block long, connected with the office and the trucks coming in back up against the terminal. The work of unloading is performed by gangs of three or four men together. One is a checker, one is an unloader and one is a wheeler. The checker goes into the office, asks for bills to correspond with the incoming load, and, after securing the bills from the terminal manager, his gang starts unloading freight on the terminal. The duties require the checker to check the freight, the sorter sorts it out, and the wheeler puts the freight in separate sections in the terminal and is told by the checker where to put it. The outgoing freight was operated in a similar manner but was carried on mostly in the nighttime. Plaintiff, as checker, had supervision of the others working with him, was in contact with the office, and checked payrolls, as well as shipment bills from various States named thereon against shipment freight loads, to see that they corresponded and tallied correctly.

Defendant contends that plaintiff has no right to bring any action under the Fair Labor Standards Act because the nature of his employment specifically exempts him from its provisions; that it is engaged in the business of interstate freight by motor vehicle and that it is under the specific jurisdiction of the Interstate Commerce Commission by virtue of the United States Motor Carrier Act of 1935; (49 U. S. Stat. 543; Title 49 U.S.C.A. sec. 304;) that plaintiff worked as a dockman, loader and dock foreman, and during all of said time performed no duties other than those inherent to, directly connected with and incidental to, the safety of the vehicles and the cargo carried thereby and the persons connected therewith or who might come in contact with said cargo, vehicles, or either or both of them; and that plaintiff does not come under the pro-

visions of the Fair Labor Standards Act for the reason that employment of this nature is specifically exempted thereby.

The trial court found the plaintiff worked 87 hours per week during the period for which this suit was brought and that the major portion of the work performed by him during that period did not affect the safety of defendant's operations and that plaintiff was not exempted from the provisions of the act. It is contended by defendant that this finding that the plaintiff is not exempted is erroneous as a matter of law and is against the manifest weight of the evidence. It is also contended by defendant that the amount of the judgment entered exceeded the court's juris- [fol. 65] diction in plaintiff's fourth-class action. In this respect the court found that plaintiff worked 87 hours per week from October 25, 1940 to October 6, 1941, which is 48 4/7 weeks which, under section 7(a)(3), were limited to 40 hours per week; that the salary of $150 per month divided by the number of hours worked and time and one-half for overtime, in violation of the provisions of the act, amounted to $487.44, and also found that, under the provisions of the act, plaintiff was entitled to a like sum of $487.44, as liquidated damages, and under further provisions of the act, entitled to attorney's fees in the sum of $175, and entered judgment for $1149.88, accordingly.

The Appellate Court held that plaintiff was exempted from section 7 of the Fair Labor Standards Act for the reason that some part of his workweek was devoted to the direction and supervision of the loading of interstate motor vehicle carriers and that some of his duties substantially affected the safety of operation. The correctness of the Appellate Court's holding that the true determinant is whether an employee performs any duties which substantially affect the safety of operation, rather than whether the duties affecting safety are substantial, is the principal question before this court for solution. At this point it might be said that the trial court held as a matter of law, and found as a matter of fact, that the major portion of plaintiff's work did not affect the safety of defendant's operations within the meaning of section 204 of the Motor Carrier Act of 1935, and that plaintiff was not, therefore, exempted by virtue of said section 13(b), of the Fair Labor Standards Act of 1938, while the Appellate Court held that some part of plaintiff's work was devoted to the

direction and supervision of loading of interstate motor freight carriers, that there was no question that the loaders in his gang were exempted from section 7 of the Fair Labor Standards Act because of the manner in which their work affected the safety of the operation of defendant's motor vehicles and that the duties of plaintiff, who planned and directed the loading, affected that safety. The Appellate Court further held that the true determinant is whether an employee performs any duties which substantially affect the safety of operation rather than whether the duties affecting safety are substantial, and that the finding of the lower court that plaintiff is not exempted was erroneous as a matter of law.

It is urged by plaintiff that the Appellate Court's determination that an employee is exempt who performs "any" duties which substantially affect the safety of operation, [fol. 66] as distinguished from performing substantial duties affecting such safety, is not supported by any ruling or court decision and is not the law. This, of course, presents the question as to what is, as a matter of law, the correct determinant, considering the purpose of the Motor Carrier Act.

Much difficulty has been encountered by the courts and the Interstate Commerce Commission as to the construction to be given section 204 of the Motor Carrier Act of 1935. (49 U. S. Stat. 543, 49 U.S.C.A. par. 304.) That section empowers the commission to regulate the qualifications and hours of service of employees whose activities affect the safety of operation. (*United States* v. *American Trucking Ass'n*, 310 U. S. 534-553, 60 S. Ct. 1059-1067, 84 L. ed. 1055.) Section 13(b) of the Fair Labor Standards Act provides, "The provisions of section 207 of this title shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49; or (2) any employee of an employer subject to the provisions of sections 1-27 of Title 49." It can thus be seen that section 13(b) exempts from the provisions of section 7, any employee subject to the jurisdiction of the Interstate Commerce Commission under section 204 of the Motor Carrier Act.

In Ex Parte No. MC-2, 28 M.C.C. 125, the commission interpreted the term "safety of operation," used in

that case, to include employees who devote a substantial part of their time to activities which directly affect safety of operation. At page 131, the commission stated, "We therefore conclude that under said section 204(a) we have power to establish qualifications and maximum hours of service with respect only to employees who devote a substantial part of their time to activities which directly affect safety of operation. Our task is thus narrowed to determining which employees of common and contract carriers and of private carriers of property by motor vehicle, engaged in interstate or foreign commerce, fall within that category." It was held in the *American Trucking Ass'n case* that the commission and the wage and hour division have both interpreted section 204(a) as relating solely to safety of operation and that such interpretations are entitled to great weight. The court in that case, after referring to section 204(a) of the Motor Carrier Act and section 13(b) of the Fair Labor Standards Act which provided, "The [fol. 67] provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204, (Title 49, par. 304,) of the Motor Carrier Act of 1935," said: "This exemption brought sharply into focus the coverage of employees by Motor Carrier Act, Section 204(a). Clerical, storage and other nontransportation workers are under this or the Fair Labor Standards Act, dependent upon the sweep of the word employee in this act. The Commission again examined the question of its jurisdiction and in Ex Parte No. MC-28 again reached the conclusion that its power under 'section 204 (a)(1) and (2) is limited to prescribing qualifications and maximum hours of service for those employees . . . whose activities affect the safety of operation.' It added: 'The provisions of section 202 evince a clear intent of Congress to limit our jurisdiction to regulating the motor-carrier industry as a part of the transportation system of the nation.'"

We have analyzed the cases as to the interpretation and construction to be given the Motor Carrier Act as to employees coming thereunder by reason of their employment affecting safety operations and are of the opinion that the true determinant is not whether an employee performs any duties which substantially affect the safety of

operations, but whether the duties affecting the safety are substantial. This brings us to the question of the effect of the Appellate Court's decision.

Plaintiff's contention is that the Appellate Court erred in disregarding the specific findings of the trial court that the major portion of plaintiff's duties did not affect safety of operation; that the findings of the court cannot be disregarded or disturbed unless against the manifest weight of the evidence; that where the evidence is merely conflicting the Appellate tribunal should not substitute its judgment as to the credibility of witnesses for that of the jury or the trial court. Plaintiff, therefore, insists that this court reverse the judgment of the Appellate Court and affirm the findings and judgment of the trial court. We do not think the Appellate Court substituted its judgment, as to the credibility of witnesses, but only exercised its authority under section 89 of the Civil Practice Act, to make a final determination of the case different from that of the trial court. (Ill. Rev. Stat. 1943, chap. 110, par. [fol. 68] 213.) In nonjury cases, such as this, the Appellate Court may make findings of fact different from the findings of the trial court. In the case of *Ebbert* v. *Metropolitan Life Ins. Co.* 369 Ill. 306, this court, at page 310, said: "It is appellant's contention that, since the evidence was conflicting, it was the province of the trial judge to weigh the evidence, and that, by invading that province and reversing the judgment, the Appellate Court committed an error of law. However, this contention cannot be sustained in view of the contrary language of section 89 of the Civil Practice act. (Ill. Rev. Stat. 1937, chap. 110, par. 213.)". Plaintiff's contention that this court should affirm the findings and judgment of the trial court in that respect is not tenable.

Defendant contends the Appellate Court has exercised its statutory authority making final decision of the case and that the decision of the Appellate Court should therefore be affirmed. This presents the question as to whether or not the facts found by the Appellate Court sufficiently appear in the opinion or in the final judgment, or, from an examination of the two, to support the judgment as entered. We think the question of fact to be properly determined in this case is whether or not a substantial part of plaintiff's work affects safety of operation of motor vehicles, and that this question of fact controls this case.

If it be determined from the evidentiary facts that plaintiff, in a substantial part of his work, was engaged in safety of operation of motor vehicles, or the cargo thereof, he would be exempted from the Fair Labor Standards Act, as a matter of law.

The Appellate Court found that the loaders in Appellant's gang were exempted from section 7 of the Fair Labor Standards Act and that appellant therefore came within the exemption because he planned and directed the loading effecting the safety of operation.

The substantial effect of the comment of the Appellate Court was to effect that the quantity of plaintiff's activity was not the true test of exemption from the Fair Labor Standards Act, yet said court did hold the appellant was in the same position as the loaders.

The Appellate Court may be in error in the reasons given for its judgment, but, under the facts as found by the court, the employee came within the same exemption as loaders, dockmen and helpers.

For the reason aforesaid, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

[fol. 69] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the 8th day of January in the year of our Lord, one thousand nine hundred and forty-five, within and for the State of Illinois.

Present: William J. Fulton, Chief Justice; Justice Clyde E. Stone, Justice Walter T. Gunn, Justice June C. Smith, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice Charles H. Thompson; George F. Barrett, Attorney General; Harry G. Newman, Marshal.

Attest: Earle Benjamin Searey, Clerk.

Be it Remembered, that, to-wit: on the 17th day of January, 1945, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

No. 28309

MAX LEVINSON, Employee, Appellant,

vs.

SPECTOR MOTOR SERVICE, a Corporation, Appellee

Appeal from Appellate Court, First District

4161115, 42651

Error to

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Appellate Court for the First District aforesaid, Be Affirmed in All Things and Stand in Full Force and Effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said appellee recover of and from the said appellant Costs by it in this behalf expended, to be taxed, and that it have execution therefor.

I, Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 14th day of June, 1945.

Earle Benjamin Searcy, Clerk, Supreme Court of the State of Illinois.

[fol. 70] And afterwards, to-wit, on the 12th day of February, 1945, the same being in vacation after the term of Court aforesaid, there was filed by Appellant herein a Petition for Rehearing, which is in the words and figures following, to-wit:

[fol. 72] IN THE SUPREME COURT OF ILLINOIS

[Title omitted]

PETITION FOR REHEARING—Filed February 12, 1945

Now comes Max Levinson, plaintiff-appellant, by Yale & Yale, his attorneys, and presents his petition for rehearing of the above entitled cause and respectfully prays that a rehearing be granted in said cause upon the grounds and for the reasons hereinafter set forth in the petition herewith presented.

Yale & Yale, Attorneys for Plaintiff-Appellant.

[fol. 73] May it please the Court:

This Court's opinion states that plaintiff checked, *unloaded* and received inbound freight. The statement that the plaintiff "unloaded" freight is erroneous. This Court overlooked the fact that the uncontradicted testimony in the record is that plaintiff never unloaded or loaded freight (Abst. 13-14). The record shows that plaintiff never so much as "carried a package." As this is an element to be considered in deciding this case, this Court overlooked the fact that the Interstate Commerce Commission defined a loader as exempted from the Fair Labor Standards Act only when, as a loader, he devotes a *substantial* part of his time to activities which *directly* affect safety of operation (App. br. 15). No witness testified in this case that the duties of plaintiff were those of a loader, dockman or helper.

This Court enumerated the many duties of plaintiff but still overlooked and misapprehended a great number of other duties he performed not connected with safety of operation, all of which are more fully set forth in abstract pages 8 to 18 and 29 to 31, inclusive. It is important that this be considered because it shows that the trial Court was amply justified in finding that the major part of plaintiff's duties did not affect safety of operation.

As to defendant's defense, outlined in the opinion, this Court overlooked and misapprehended that the matters set forth constitute no defense. Defendant's allegation that plaintiff is specifically exempt from provisions of the Fair Labor Standards Act is general. The allegation that the Interstate Commerce Commission has jurisdiction of plaintiff is of no consequence without alleging how it has

acquired such jurisdiction, and linking it to a proper defense. The allegation that plaintiff worked as a dockman, [fol. 74] loader and dock foreman is insufficient unless in the language of the Interstate Commerce Commission, it is also alleged and proven that such were his duties and that he was a loader, dockman or dock foreman who devoted a *substantial* part of his time to activities *directly* affecting safety of operation; that the allegations, referring to the safety of vehicles and "the cargo carried thereby" and the persons connected therewith, are immaterial because the Commission and the decisions of the courts hold that the matter of safety is confined to the *vehicles* only, not to cargo as cargo or to persons as persons. *Anuchick* v. *Trans. Freight Co.*, 6 Labor Cases, 61, 245.

This Court further overlooked and misapprehended the significance of the Appellate Court's statement that *some* part of plaintiff's work was devoted to the direction and supervision of loading. This is simply a statement gleaned from the record. If it is remembered that the trial Court found that the major portion of plaintiff's duties did not affect safety of operation, it necessarily follows that some part of plaintiff's duties affected such safety; otherwise, the trial Court would have found that *all* of plaintiff's duties did not affect such safety. It is thus clear that the Appellate Court merely made a statement based on an inference, and such statement is unlike and contrary to the character and nature of making a finding of fact different than the finding made by the trial Court.

The point of greatest importance, however, is that the Appellate Court did not find or hold that plaintiff did a *substantial* part of work in safety of operation rather than *some* part. Had this been done, it would show an intention to make a finding different than the trial Court, which found that the major portion of plaintiff's work did not affect such safety. The Appellate Court did not so hold but used the word "some" for its basis in stating that plaintiff did work affecting such safety. Therefore, the [fol. 75] Appellate Court held that if "*any*" of plaintiff's work affected such safety, he is exempt from the Act.

This Court overlooked and misapprehended that the Appellate Court assumed a fact which is not borne out by the record, and was not in issue or decided. That assumed fact is that there was no question that the loaders in plaintiff's gang were exempted from Section 7 of the Labor Act

because of the manner in which their work affected safety of operation. The record in this case nowhere shows any finding, issue, evidence or stipulation to the effect that the loaders in plaintiff's gang were exempt. The loaders were not involved here, and any finding as to loaders is extraneous and is based purely on conjecture and not on any matters in issue. This Court erroneously considered this assumption as if it were a fact found in a judicial inquiry. It then based its own decision on such assumption, and overlooked the fact that the Appellate Court's decision itself negatives the Supreme Court's impression that the Appellate Court made any findings, or was guided by findings, in its decision because it expressly states the following:

> "It is our conclusion that the finding that plaintiff is not exempted is erroneous *as a matter of law*, and the judgment based thereon be and it is hereby reversed." (Italics ours.)

Furthermore, even if the Appellate Court assumed that plaintiff's services were of the same class as loaders, it made no finding whatsoever as to whether these services were a *substantial* part of plaintiff's duties. This was essential because this Court adopted a different determinant than the Appellate Court and plaintiff's duties were admitted to be diversified and fluctuating.

This Court overlooked and misapprehended the significance of its holding that the true determinant is *not* whether an employee performs *any* duties which substantially affect [fol. 76] safety of operation but whether the duties affecting safety are substantial. This interpretation was urged by plaintiff-appellant. It was contended by him here that the Appellate Court erred in holding that the true determinant is whether "*any*" duties were performed by plaintiff in safety. It is evident that this is the crux of the case and is the only point here involved. It is clear that after this Court adopted its liberal construction, which is in accord with all past decisions, then there was nothing further to do but to reverse the Appellate Court for reversing the trial Court upon an erroneous determinant. The determinant adopted by this Court is the opposite of the Appellate Court's test. It is decisive of the issues in this case because the trial Court found that the *major* portion of plaintiff's work-week did not affect safety of opera-

tion. Taking away the major portion from the whole, nothing but a minor or unsubstantial portion remains. Therefore, according to the opinion of this Court, an unsubstantial portion of duties performed in safety should not exempt an employee from the overtime provisions of the Act.

This Court refers in its opinion to the U. S. Supreme Court's holding that the interpretations of the Interstate Commerce Commission and the Wage and Hour Division are "entitled to great weight." However, it misapprehends that affirming the Appellate Court's decision is in direct conflict with, and contrary to, their interpretations.

Interpretive Bulletin No. 9 of the Wage and Hour Division (Fifth Revision October 1943) states that if the greater part of an employee's duties do not affect safety of operation, such employee was not within the scope of the exemption contained in Section 13 (b) (1). The Bulletin states:

> "It should be noted that any truck driver, drivers' helper, mechanic or loader employed by a common, [fol. 77] contract or private carrier, who spends the greater part of his time during any workweek on non-exempt activities (such as producing, processing or manufacturing goods, warehouse or clerical work, or other type of work which does not affect safety of operations) is not within the scope of the exemption contained in section 13 (b) (1). It is the opinion of the Division that Congress did not intend that this exemption should be available as a vehicle to exempt employees who spend most of their time in work other than that which forms the basis of the exemption. . . .
>
> "See *Anuchick et al.* v. *Transamerican Freight Lines*, 8 Labor Cases, 61,245; *Hutchinson* v. *Barry* (U. S. D. C. Mass.) 3 Federal Carrier cases, par. 80,095 (6 Wage Hour Report, 616) *cf. Knight, i.c.* v. *Mahtel*, 6 Wage Hour Rept. 466"

Moreover, this Court overlooks the fact that plaintiff spent *some* time only in duties affecting safety and yet deprives him of the benefits of the Act. There is no adjudication or evidence in the record that plaintiff's duties in safety of operation were *substantial*, but there is evidence, and a finding based on such evidence, that the

greater portion of plaintiff's duties did not affect safety of operation, from which it can be inferred that the duties affecting safety were in fact not substantial. It is thus clear that the determinant or test adhered to by this Court has not been followed in arriving at its decision. This Court, in effect, based its decision upon the same theory as the Appellate Court, but instead of employing the determinant of "*any*" duties, this Court, in effect, substituted "*some*" duties in affirming the Appellate Court.

The trial Court's finding that the *major* portion of plaintiff's duties were not performed in safety of operation means that the converse must be true, that only a small or minor portion of time was left for him to devote to [R. 78] safety of operation. The Appellate Court, in another case, defined the meaning of the word "major" as follows:

> "The word, 'major,' as used in Bulk Sales Act, which requires compliance with the Act in the case of a sale of a major part of a seller's business, must be construed in its ordinary meaning and, as so construed, means greater or larger." *Zenith Radio Distributing Corp.* v. *Mateer*, 311 Ill. App. 263.

Webster's New International Unabridged Dictionary defines "major" as greater in number, quantity or extent; as, the major part of the assembly; the major part of revenue.

This Court misapprehended the application of Section 89 of the Civil Practice Act for the reason that said section only applies where it *sufficiently* appears from the opinion of the Appellate Court, or the finding or judgment, or from an examination of the two, that certain findings were made. This is a provision designed to prevent reversals on technical ground that the facts found, although stated in the opinion, are not recited in the final order. However, this section is not designed to make findings not supported by the record in the case. (*Darmody* v. *Kroger Grocery & Baking Co.* 362 Ill. 554.) Nor is it designed to serve as a means to search the opinion for such material as can be said to amount to a finding. The plain language of the section is that the findings must *sufficiently* appear; although not in the judgment order itself. In this case it does not sufficiently appear from the Appellate

Court's opinion that the reversal of the trial Court is based on findings of fact. It is there stated expressly that the judgment is erroneous *as a matter of law* and was reversed for that reason.

The only reason which this Court gives for stating that this case was decided by the Appellate Court on a question [fol. 79] of fact is what this Court calls a "comment" of the Appellate Court and which this Court seems to conclude to be a finding to the effect that, if the loaders in appellant's gang were exempted from Section 7 of the Act, then appellant therefore came within the exemption because he planned and directed the loading affecting the safety of operation. The Supreme Court overlooks and misapprehends the significance of this "comment" and erroneously considers it a finding of fact. There is no evidence or finding in the record that the loaders in plaintiff's gang were exempt, or that they devoted a *substantial* part of their time to activities which directly affected safety of operation. It is evident that the Appellate Court did not intend this as a finding that plaintiff devoted a *substantial* part of his work-week to duties directly affecting safety of vehicle operation, but simply used it to formulate its determinant. That Court reasoned that since plaintiff did *some* amount of work in safety of operation, then *any* amount of such work exempts him from the benefits of the Act.

This Court overlooked and misapprehended the fact that, even if plaintiff did perform some work in safety of operation, it was only an unsubstantial part of his work-week and could not amount to a substantial part. This is borne out by the evidence that plaintiff's duties were fluctuating and diversified, all of which had to do with the orderly and efficient operation of the terminal and had no relation to safety of operation of the vehicles as such while traveling along the highway. It was not denied by defendant that plaintiff was employed as a checker and performed other duties. This Court overlooked the cases cited in appellant's brief to show that recovery was allowed in similar cases, and cited no authority to support its position that if some duties performed by an employee are substantial, then he [fol. 80] is exempt without a proper adjudication of the term "substantial" as interpreted by the Commission, the Wage and Hour Division and the Courts. It appears, therefore, that plaintiff-appellant was deprived without

due process of law of the benefits of a judgment entered by a competent court of record.

This Court overlooked and misapprehended that the Commission itself refused to assert jurisdiction over all terminal or freight employees. It enumerated four definite classes of employees and refused to include checkers such as plaintiff, and even refused to assert jurisdiction over drivers or dock foremen unless it could be shown that they spent a *substantial* part of their work-week in work *directly* affecting safety of operation. This Court also misapprehended that the Fair Labor Standards Act must be liberally construed or its purpose would not be promoted thereby; that it must be *assumed* that all employees in interstate commerce, as far as reasonably possible, should be made subject to the provisions of the Act and not excluded therefrom; that exemptions would tend to defeat the purpose of the Act and should be strictly construed.

Conclusion

In view of the fact that this Court has overlooked the matters hereinabove pointed out, we respectfully urge that a rehearing be granted, and that on such rehearing the judgment of the Appellate Court should be reversed and the judgment of the trial Court should be affirmed.

Respectfully submitted, Yale & Yale, Attorneys for Plaintiff-Appellant.

[fol. 81] UNITED STATES OF AMERICA.

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the 12th day of March in the year of our Lord, one thousand nine hundred and forty-five, within and for the State of Illinois:

Present: William J. Fulton, Chief Justice; Justice Clyde E. Stone, Justice Walter T. Gunn, Justice June C. Smith, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice Charles H. Thompson; George F. Barrett, Attorney General; Harry G. Newman, Marshal.

Attest: Earl Benjamin Searcy, Clerk.

And afterwards, to-wit, on the 19th day of March, 1945, being one of the days of the term of Court aforesaid, the Court having considered the Petition for Rehearing filed by Appellant herein, and being fully advised in the premises, Doth Deny said Petition for Rehearing.

[fol. 82] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the 14th day of May in the year of our Lord, one thousand nine hundred and forty-five, within and for the State of Illinois.

Present: William J. Fulton, Chief Justice; Justice Clyde E. Stone, Justice Walter T. Gunn, Justice June C. Smith, Justice Francis S. Wilson, Justice Loren E. Murphy, Justice Charles H. Thompson; George F. Barrett, Attorney General; Harry G. Newman, Marshal.

Attest: Earle Benjamin Searcy, Clerk.

And afterwards, to-wit, on the 14th day of June, 1945, the same being in vacation after the term of court aforesaid, a

Praecipe for Record was filed by Appellant herein, which is in the words and figures following, to-wit:

[fol. 83] IN THE SUPREME COURT OF ILLINOIS, SEPTEMBER TERM A. D., 1944

No. 28309

MAX LEVINSON, Employee, Plaintiff-Appellant,

vs.

SPECTOR MOTOR SERVICE, a Corp., Defendant-Appellee

Appeal from the Appellate Court of Illinois, First District, on Certificate of Importance

Tried heard on appeal from Municipal Court of Chicago. Honorable Wendell E. Green, Judge Presiding.

PRAECIPE FOR RECORD

To the Honorable Earle Benjamin Searcy, Clerk of the Supreme Court of Illinois:

Please prepare for transmission to the Clerk of the Supreme Court of the United States a certified transcript of record of the proceedings had and documents filed in the above entitled cause in the Supreme Court of Illinois, as follows:

1. Placita.

2. Copy of Printed Abstract and Additional Abstract of transcript of record of the Municipal Court of Chicago, Illinois, on appeal of the above entitled cause to the Supreme Court of Illinois.

3. Copy of the complete transcript of record of proceedings had in the above captioned cause in the Supreme Court of Illinois, including motion of Metcalf Walling, Administrator of the Wage & Hour Division, United States Department of Labor, for leave to file Brief as Amicus Curiae and suggestions filed by him in support of his motion.

4. Copy of printed petition for rehearing filed pursuant to Rule 44 of the Illinois Supreme Court.

5. Copy of this praecipe for record and proof of service thereof.

6. Certificate of the Illinois Supreme Court Clerk, certifying that the foregoing is a true and correct copy of the proceedings had and documents filed in this cause in the Supreme Court of Illinois as specified in the foregoing Praecipe for Record.

[fol. 84] Max Levinson, Plaintiff-Appellant, by Harry L. Yale, His Attorneys.

Received a copy of the foregoing Praecipe for Record this 13 day of June A. D., 1945.

Golden & Golden, Attorneys for Spector Motor Service, a Corp., Defendant-Appellee.

[fol. 85] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

I, Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois, and keeper of the records and Seal thereof, do hereby certify the foregoing to be a true copy of

1. Placita showing that Record of the Municipal Court of Chicago was filed on September 2, 1944.
2. Abstract of Record filed by Appellant on September 2, 1944.
3. Additional Abstract of Record filed by Appellee on September 30, 1944.
4. Motion by L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, and Suggestions in support of said Motion, filed on October 28, 1944.
5. Order of Court denying said Motion, entered on November 14, 1944.
6. Order of Submission entered on November 27, 1944.
7. Opinion of the Supreme Court of Illinois filed on January 17, 1945.
8. Mandate.
9. Petition for Rehearing filed by Appellant on February 12, 1945.
10. Order entered on March 19, 1945, denying Petition for Rehearing.
11. Praecipe for Record filed by Appellant on June 14, 1945.

filed in this office in a certain cause entitled in this Court

No. 28309

MAX LEVINSON, Employee, Appellant,

vs.

SPECTOR MOTOR SERVICE, a Corporation, Appellee

Appeal from Appellate Court, First District

41611-15. 42651

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 14th day of June 1945. Earle Benjamin Searcy, Clerk, Supreme Court of the State of Illinois. (Seal.)

[fol. 86] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1945

The petition herein for a writ of Certiorari to the Supreme Court of the State of Illinois is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson and Mr. Justice Burton took no part in the consideration or decision of this application.

[Endorsed on Cover:] Enter Richard S. Folsom. File No. 48,842, Illinois, Supreme Court, Term No. 139. Max Levinson, Petitioner, vs. Spector Motor Service, a corporation. Petition for a writ of certiorari and exhibit thereto. Filed June 19, 1945. Term No. 139 O. T. 1945.